

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)



DATE ISSUED: September 29, 2000

CASE NO.: 2000-LHC-268, 2000-LHC-269

OWCP NO.: 8-115708, 8-115709

IN THE MATTER OF

GARY EGBERT

Claimant

v.

TINKER AIR FORCE BASE, OKLAHOMA

Employer/Respondent

AIR FORCE INSURANCE FUND

Insurance Carrier/Respondent

APPEARANCES:

Rhonda G. Thomas

For Claimant

Charles L. Brower

For Employer/Respondent

BEFORE: C. RICHARD AVERY

Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Gary Egbert (Claimant) against Tinker Air Force Base (Employer) and Air Force Insurance Fund (Carrier). The formal hearing was conducted at Oklahoma City, Oklahoma on June 28-29, 2000. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.¹ The following exhibits were received into evidence Joint Exhibit 1, Claimant's Exhibits 1-17 and Employer's Exhibits 1-30.² This decision is based on the entire record.³

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. Claimant was allegedly injured/ had an accident on March 14, 1998 and August 7, 1998;
2. An employer/employee relationship existed at the time of the alleged injuries;
3. A Notice of Controversion was filed on December 8, 1998;
4. An informal conference was held on June 9, 1999;
5. Claimant's average weekly at the time of each injury was \$345.08 for the

¹The parties were granted time post hearing to file briefs. Upon motion of Employer's counsel the time was extended up to and through September 25, 2000.

² Claimant's Exhibit 2, pages 1 and 11, were excluded.

³ The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __, lines __"; Joint Exhibit- "JX __, pg. __"; Employer's Exhibit- "EX __, pg. __"; and Claimant's Exhibit- "CX __, pg. __".

52-week period preceding March 14, 1998, and \$359.69 for the 52-week period preceding August 7, 1998;

6. Claimant has received no disability or medical benefits; and

7. The date of maximum medical improvement was August 12, 1998.

Unresolved Issues

The unresolved issues in this case are:

1. Whether the injuries arose in the course and scope of employment;
2. If the injuries did arise in the course and scope of employment, whether the claim arising from such injuries is barred by Claimant's failure to give timely notice of such injuries as required by Section 12 of the Act;
3. If the claim is not barred under Section 12 of the Act, whether Claimant's right to compensation under Section 8 of the Act was extinguished by his termination from employment for cause, effective September 5, 1998; and
4. If the claim is not extinguished because of Claimant's termination, whether Claimant's right to compensation was extinguished by the availability of suitable alternate employment.

Statement of the Evidence

Testimonial and Non Medical Evidence

Claimant is 45 years of age. He has a high school diploma and has been married for 20 years. Claimant has held many jobs. His place of employment at the time of the alleged injury was at Tinker Air Force Base (TAFB). He worked at TAFB in recycling for approximately 5 years, the last 2 years in the metals yard as a materials identifier and examiner. Claimant was terminated effective September 5, 1998. He has since only been employed for five days at an Auto Parts Distribution

warehouse.

Claimant testified that while he worked at TAFB in the metals yard, he had occasion to go over to other yards, particularly the paper or wood yard. Upon hiring on at TAFB, Claimant underwent a premedical evaluation. A problem was found to exist with regards to his hearing and he notified them that he had been on antidepressants. However, during Claimant's stint at TAFB he did not exhibit symptoms consistent with depression, and no restrictions were placed upon him.

Claimant alleges that he has been exposed to Triorthocresylphosphate (TOCP) and Methyl ethyl ketone (MEK) during his employment at TAFB. TOCP is a chemical used in greases and hydraulic oils and fluids, and MEK is a blend of chemicals found in cleaning agents often used in Claimant's work environment. Employer did not provide Claimant with the Materials Safety Data Sheet (MSDS) for TOCP. Claimant was, however, provided with MSDSs with regards to other chemicals. As a result of this exposure, Claimant believes that he suffers from multiple chemical sensitivity syndrome and that he is permanently and totally disabled. He alleges toxic exposure from inhalation exposure and exposure through dermal contact.

During Claimant's employment in metals, he was exposed to oils, greases and lubricants. To prevent skin contact with these chemicals, Employer provided Claimant with leather gloves. (RX 26) These gloves absorbed the oil so that the oil came in direct contact with skin. Sometimes holes developed so that fingers stuck through the ends of the glove and the skin would come in contact with the oil. Claimant reported the problem with the gloves to his supervisor and later to OSHA. However, if Employer did not have a replacement pair of gloves on hand, Claimant would have to wait several days for replacements.

Claimant was provided with HAZCOM training by the Air Force. Claimant was told that if he smelled something, then he was being contaminated by it. This statement was reinforced in the Air Force handbook that he was provided with during the training.

Claimant testified that, prior to the March 14th episode, he never received treatment for the symptomatology he experienced as of March 14, 1998. He did testify, however, that he had memory problems prior to March 14, 1998. A co-

worker, Mr. Brewer, stated in a letter that it appeared as though prior to March 14, 1998, Claimant experienced mild seizures while on the job. (RX 16)

Saturday, March 14, 1998 was the day of Claimant's first alleged injury. He and his family were leaving on their Spring Break trip to Galveston, Texas. Claimant was driving the family van. He coughed and the next thing he remembered was standing in a field, off of the side of the road. Claimant's wife testified that Claimant appeared unresponsive, confused, rigid and had a fixed stare. She had difficulty getting control of the van. A passerby called the Highway Patrol which quickly arrived on the scene. Claimant's wife drove him to the Pauls Valley General Hospital emergency room. Blood work was taken and after six hours, Claimant was sent to Norman Regional Hospital to undergo a CAT scan. He spent two days at the hospital, at which time more tests were performed. After that, he was released. Claimant waited three to four days before he could see his physician of choice, Dr. Swygert.

After being released from Norman Regional, Claimant called his employer, Mr. Tubbs, and related the episode. Claimant did not at that time indicate that he thought the seizure was work related. Claimant's wife testified that post accident, Claimant experienced left side weakness, slurred speech, confusion, tremors and had difficulty finding the "right" words.

In April or May of 1998, Claimant began to suspect that his symptoms might be work related. He came to this conclusion because Dr. Swygert began questioning Claimant's work activities over at TAFB⁴. Claimant testified that Dr. Swygert suggested that Claimant's symptoms were due to possible contamination. Over the course of several visits, Dr. Swygert performed various tests. Claimant was exhibiting the following symptomatology: severe chest pains, full body tremors, bouts of confusion, memory problems, severe bleeding in stool, stomach problems, and skin problems which included sores and rashes.

Claimant has two other occasions upon which he was rushed to the hospital. On April 7, 1998, during work hours, Claimant's wife was called to his workplace

⁴Dr. Swygert's report following the March 14, 1998 accident was not offered into evidence; what is offered here is simply Claimant's version of Dr. Swygert's remarks and findings.

and had to take Claimant to the hospital because he was exhibiting severe chest pains, full body tremors, confusion, and had difficulty speaking. The following Saturday, Claimant was again taken to the emergency room.

According to Claimant, Dr. Swygert indicated to him that his symptomatology could be connected to his employment. She told Claimant that he should contact OSHA and have them do testing at TAFB. Dr. Swygert, herself, contacted OSHA and OSHA advised her to contact Occupational Medical Services (OMS). Dr. King, at OMS, instructed Dr. Swygert to have Claimant contact Dr. King. Claimant, thereafter, went to see Dr. King. At OMS, Claimant testified that he was advised by the staff there that he had to first file a Worker's Compensation claim prior to seeing Dr. King. Two to three days later in August 1998, Claimant testified that Russell Staton called him at work and explained that if Claimant filed a Worker's Compensation claim, that his claim would be reviewed by a committee and probably denied. Then, he would take action against Claimant for filing a false Worker's Compensation claim.

Claimant testified about several exposures he suffered while on the job. A month prior to the March 14th automobile episode, Claimant was working on aircraft parts that had been packaged in the 1970s and 1980s. He opened the boxes that stored the parts and odors, as well as oils, emanated from and saturated the boxes. In June of 1998, Claimant again opened boxes containing jet engine covers and smelled strong odors. He stated that he and his co-worker immediately had headaches, tremors and chest pains. Claimant informed Mr. Tubbs, but management never did anything. Towards the end of June 1998, Claimant had possible exposure to radioactive material. Claimant contacted Environmental, who sent over employees to inspect the area. Claimant was told that the radiation was not harmful. Another incident occurred at the end of June or beginning of July involving engine coolers. These coolers were full of oils. Claimant handled these parts four or five times. He handled the parts with leather gloves. At the end of July, first part of August, Claimant again handled engine coolers. These parts also contained oils.

August 7, 1998 was another incident of exposure that Claimant testified about. Claimant was wearing goggles. He, however, was not wearing an apron nor was he wearing an air mask for ventilation. Claimant was cutting the bottoms out of metal barrels, a 55 gallon drum, that had just come from the barrel triple rinse yard.

The barrels themselves contain barrel bungs, which are the two small holes in the very top of the barrel. Except for the holes, the barrel is completely encased. When Claimant was cutting off the bottom of the barrel with a cutting torch, he was overcome by a very strong odor. Claimant immediately experienced headache, chest pains, tremors, confusion, and memory problems. Larry Snow, his co-worker, was working with him. Mr. Snow was moving the barrels with a forklift from the rinse yard to the yard where Claimant was cutting them. Claimant immediately took the MSDS from the barrel and told Mr. Tubbs and Russel Staton about the incident. He then went to OMS where various tests were conducted and then went home early. That same day, Claimant went to the Oklahoma City Clinic where tests were run. Claimant took vacation days from August 7-12, 1998, and according to Claimant, Dr. Swygert cleared him to go back to work on August 13, 1998⁵. Claimant continued to work at TAFB and he continued to experience symptoms until his termination on September 5, 1998.

Claimant made a complaint to OSHA that included charges of possible dangers related to hazardous exposure to chemicals. (RX 29) OSHA inspected the metals yard on July 16, 1998. TAFB received a citation from OSHA for not providing safety equipment. (CX 14) This citation, issued August 19 1998, was posted in Claimant's work area. Claimant's exhibit 13 is the Notice of Unsafe or Unhealthful Working Conditions sent from OSHA. Claimant's exhibit 12 is a letter, dated September 10, 1998, addressed to Claimant that discusses the OSHA findings from their July 16, 1998 inspection of TAFB.

On August 31, 1998, Claimant testified that he was possibly exposed to more toxins from an oil spill in the yard. Claimant was then terminated on September 5, 1998. The reason for the termination was that Claimant had allegedly created an oil spill on July 15, 1998, for the purpose of drawing OSHA'S attention during their inspection. Claimant denied the charge. He testified that he was not in the yard, rather, he and 2 co-workers were doing the paperwork for the weights of the different classifications of metal he had sorted out. Claimant testified that he never intentionally spilled oil on the yard.

⁵As would later be established through testimony, Claimant mistakenly referred to Dr. Swygert as the doctor who cleared him to go back to work. Dr. Angles, at OMS, actually cleared him to return to work on August 12, 1998.

Between August 14 and August 18, 1998, Claimant signed a handwritten form provided by Mr. Tubbs that stated Claimant did not want to file a Worker's Compensation claim. (RX 19) On August 31, 1998, Claimant was given his letter of removal. He was told that he could appeal the removal, so he began the appeals process. The final decision upheld the termination. The following week Claimant was actually removed from TAFB. November 14, 1998, Claimant filed a written request for Worker's Compensation. Claimant received the final decision regarding his termination in May of 1999.

Claimant has seen a variety of doctors. His physician of choice was Dr. Swygert. She referred him to Dr. Tribbey, a neurologist, in April of 1998. In May 1998, Claimant was seen by Drs. Parks and Paul. Dr. Paul recommended that Claimant have a neuropsychological evaluation by Dr. Adams. Claimant went to see Dr. Carella for such evaluation. Claimant next saw Dr. Angles, at OMS, following the August 7, 1998 incident. He then saw another doctor in December 1999. Claimant saw Dr. Moser, his new physician of choice, in February 2000. In May 2000, Claimant was referred by Dr. Moser to see Dr. Adams for an evaluation of his intellectual and cognitive functioning. Dr. Moser also referred Claimant to Dr. Paul for evaluation at the Poison Treatment Clinic.

During Claimant's period of employment at TAFB, he received numerous awards: Employee of the Quarter, once in 1994 and twice in 1995, and cash awards. (CX.9, CX 10) Claimant's performance was also evaluated yearly during his period of employment. He always received very high marks. (CX. 11)

According to Claimant, since his termination his symptoms have appeared less frequently if he stays away from all toxic materials, perfumes, colognes, and hand soap. He has had to stop working on his own car, except in emergency situations and he has stopped going to church. When Claimant's symptoms are "triggered", he experiences chest pains, tremors, memory loss and confusion. Claimant also stays out of stores and leaves his house when his wife cleans.

Claimant has applied for many jobs. His testimony was that when he enters the work environment, smells trigger his symptoms. Therefore, he says he has not been able to handle employment as a result of his onset of symptoms from exposure to certain smells.

On cross examination it was brought out that Claimant had been previously employed as an auto mechanic and as such had exposure to oils and lubricants. Claimant also admitted that his theory of disability based upon dermal exposure to TOCP manifested itself after OSHA came out, inspected the work site, refused to make a finding of inhalation hazard but instead cited the base for violating the personal protective equipment rules of OSHA. Claimant also acknowledged that he smokes cigarettes.

Lisa Marie Adam is a management assistant in the Qualified Recycling Center, located at TAFB. She works for Russell Staton. She testified that she was present in the office when Mr. Staton made one phone call to Claimant's residence regarding the filing of a Worker's Compensation claim as a result of the August 7, 1998 episode. Ms. Adam was unsure as to whether or not Mr. Staton had informed Claimant as to the 30 day timely filing of the claim from date of injury. However, she stated that such information is standard procedure. She also testified that Mr. Staton told Claimant that Claimant could pick up such forms at the office, or the forms could be sent to his house. Ms. Adams testified that Mr. Staton had indicated to Claimant that he had an absolute right to file a Worker's Compensation claim.

Roger Wright, a private investigator in Oklahoma City, Oklahoma, was the next witness to testify. Mr. Wright did surveillance on Claimant from the last part of March, April and June of 2000. Mr. Wright testified that he observed Claimant work on his automobile for about one hour. Claimant was not wearing gloves that were discernable to Mr. Wright, though Mr. Wright testified that it was possible for Claimant to be wearing skin colored latex gloves. He stated that, located a block and a half away, he did not observe any tremors, seizure-like activity, dizziness, or unsteady gait. Mr. Wright also observed Claimant putting gasoline into his automobile and followed Claimant when he went to the grocery store and doctor's office. Claimant's activities were also observed by Mr. Wright on the day of Claimant's deposition. (RX 27) Mr. Wright, when following Claimant by car, was approximately 10 feet away. When Mr. Wright observed Claimant on foot, he was about 50 feet away. That distance made it difficult to discern facial hair. Mr. Wright also observed Claimant smoking cigarettes.

Paul David Taylor, a co-worker of Claimant's, testified next. Mr. Taylor works at TAFB as a metal identifier/ segregator. He testified that the employees are

issued leather gloves and that it is possible for an employee to have to wait a few days for a pair of replacement gloves. He never observed Claimant's gloves "soaked" with lubricant or hydraulic fluid. Mr. Taylor testified that Claimant made complaints that the workplace was unsafe. While fearing Claimant's remarks at first, Mr. Taylor came to the conclusion, after the OSHA inspection, that the workplace was a safe environment. Mr. Taylor experienced stroke like symptoms in March of 1998. He attributes these symptoms to stress from his personal life and stress caused by Claimant's concerns about contamination in the workplace. Mr. Taylor also wrote a letter to his supervisor, one month after the incident, in which he stated that he observed Claimant intentionally create an oil spill on July 15, 1998. (RX 20) On July 16 an OSHA inspector came to the base for an inspection. Claimant and Mr. Staton walked the inspectors around the yard. Mr. Taylor further went on to explain the specifics of his job in the metal yard. It was Mr. Taylor's letter that started the chain of events which ended in Claimant's termination.

Larry Dale Snow also worked at the metal yard at TAFB with Claimant. He testified as to the events leading up to Claimant's accident of August 7, 1998. He and Claimant got their safety equipment, the forklift and the necessary equipment needed to cut the barrels. He testified that he cut the barrel and that when the barrel bottom was cut, strong fumes emanated from the barrel. He pulled off the MSDS that was attached to the barrel. After he and Claimant looked at it, he gave the MSDS to Claimant. He then testified that Claimant appeared nervous and concerned and talked faster than normal. Mr. Snow did not suffer any kind of physical symptoms as a result of smelling the odor in the barrel. Mr. Snow has not observed Claimant working with soaked through gloves or gloves with a hole in the fingers. The barrels that Claimant and Mr. Snow were cutting were used to house blades off of jet turbines. They got the barrels from the barrel shop on the base. The barrels are first used for "something else", then they are triple rinsed at the barrel shop, then they are cut and used for storing blades. In other words, the barrels are recycled. The "something else" that the barrels are used for can be anything from the entire base.

Debra Mital works in the bioenvironmental engineering flight at TAFB. She is an industrial hygienist. She testified the bioenvironmental engineering flight is responsible for visiting yearly every workplace at TAFB to assess those workplaces to determine if there is any health and safety issues that need to be

addressed. However, during the survey it is possible for a report to be issued without samples taken of the work environment to assess certain exposures. The department represents the employee to ensure compliance with occupational exposure regulations set by the Air Force. It was Ms. Mital's testimony that during the inspection of chemical hazards in the workplace, the bioenvironmental engineers did not find a potential inhalation hazard and no outstanding recommendations were made.

During March and April of 1998, many visits by the office were made to the metals yard because of the incident Claimant suffered on March 14, 1998. The findings from those visits was that there was no evidence of any chemical hazard in the workplace during that time. As a result of the annual survey, either an occupational medicine physician or registered nurse will go back out to the site and do a survey and inspection of the area to ensure that there is no other possible exposure. They do an evaluation of the workplace without sampling. Prior to the March incident, the medical work site visits did not find any environmental hazards that had not been previously identified.

Ms. Mital stated she went out to Claimant's work site on June 29, 1998 because of Claimant's continuing concern. When she arrived at the site, she and the others met with the supervisors and employees and then did an inspection of the entire site. The results of the survey were the same as previous surveys made of the yard. On July 2, 1998, her co-worker, Captain Patel, tested certain parts for radioactivity and determined that there was no health hazard. Ms. Mital also participated in the July 16, 1998 OSHA inspection. Claimant's exhibit 2 is various completed Industrial Hygiene Survey Data Sheets. The report of July 16, 1998 states that "parts [that] come into the facility [have] already been decontaminated and triple rinsed, but sometimes oils are still inside the various parts. No monitoring performed due to most crates being opened in the outside area." (CX 2,pg. 12)

On July 28, 1998, Ms. Mital did further testing of the metals yard. On August 7, 1998, she sent two technicians to respond to Claimant's alleged injury following the barrel episode. The finding of the technician's test was no detectable amount of MEK or any other chemical present within the barrel.

Ms. Mital issued an industrial hygiene survey data sheet for the metals yard

which discusses that the oils and fluids are not volatilized during their sorting and that the employees should be given thin rubber gloves liners and rubber aprons. Her report stated that “personnel have the potential for skin contact with oils, lubricating fluids, and greases while handling metal articles” (CX 4, pg. 1) She testified that she had personal knowledge that the employees do not wear the thin rubber gloves and she has never observed an employee wearing the recommended rubber apron. She believes that the employees have been told by management that the rubber gloves and apron are available for their use.

Ms. Mital then testified about the ventilation process for the metals yard. She also explained that she has, or has access to, the individual MSDS of the components of the fluids, greases and lubricants used in the metals yard. Under certain circumstances, these components can pose an inhalation hazard. Ms. Mital also testified that if someone can smell an odor, then the vapor is out of the container. In other words, for a smell to emanate from the barrel, there must be residue left in the barrel. Before the barrels are triple rinsed, it is possible for it to have contained any substance on the base.

Captain Kalpesh Patel also works at TAFB. He is a bioenvironmental engineer and a base radiation safety officer. He ensures that all personnel are properly trained and he tests for the existence of radioactive material. On July 2, 1998, Capt. Patel testified that he went to the metals yard to do a radiation survey on the scrap metal bin. He determined that there was no health hazard caused by radiation. He trains, or oversees the yearly training, of the employees. The employees in the metal yard were trained in July 1998.

Dr. Alberto Angles was qualified by the court as an expert witness. He is a physician assigned to the occupational medicine department of TAFB. According to Dr. Angle’s testimony, he examined Claimant on August 7, 1998. Prior to the doctor’s examination, Claimant was evaluated by a nurse. The nurse found claimant to complain of tremors, tightness in chest, mild shortness of breath, dizziness and blurriness. Based on history provided, all of his symptoms began after he opened the bottom of the barrel. The nurse took the MSDS⁶ and listed all medications Claimant was currently taking. Dr. Angles then examined Claimant and confirmed the nurse’s evaluation. Claimant had similar symptoms in March 1998.

⁶The MSDS for MEK was included with Dr. Angles’ report in RX 10.

Claimant's exam showed him to be alert, no visible tremors, normal vision, clear lungs and his heart had a regular sounding rhythm. Dr. Angles requested three tests to be performed: pulmonary function test, liver function test and carboxyhemoglobin. The pulmonary function and liver function results were in normal range.⁷ The carboxyhemoglobin was elevated, but the doctor explained that this is possibly due to the fact that Claimant smokes cigarettes daily. Dr. Angles' professional opinion is that Claimant did not suffer from harmful exposure to MEK on August 7, 1998.

Respondent's exhibit 28 is a labor market survey dated June 19, 2000. It identifies many alternative sources of employment for Claimant. The report is based upon Claimant's medical documentation and doctor's opinions. The following are available job opportunities in the labor market in Oklahoma City, Oklahoma: desk clerk, unarmed security guard, service dispatcher, kitchen helper, buffet cashier, assistant manager, fry cook, line cook, counter clerk, and carpet cleaner. The earnings for these positions range from \$5.15 per hour and up to \$500 per week.

Respondent's exhibits 16, 17, and 18 are letters from Claimant's co-workers at TAFB. The letters describe Claimant's behavior when he worked with them and various things that he discussed with these co-workers.

Claimant's exhibit 3 is the Department of Defense Hazardous Materials Information Systems sheets.

Claimant's exhibit 5 is a memo signed by Tim Taylor, a member of the spill response team. The memo regarded a spill of hydraulic fluid that occurred on August 7, 1998, behind the fence at the Wood Recycling Facility at TAFB.

Claimant's exhibit 7 is the MSDS for petroleum hydrocarbons.

⁷Dr. Angles was shown laboratory work of a liver function test of Claimant a few days after his August 7th examination. Dr. Angles observed that Claimant's bilirubin level was elevated. This elevation was unlikely caused by Claimant's smoking. Dr. Angles testified that the elevation of bilirubin was probably due to an obstruction of the common bile or cystic duct. He testified that it was highly unlikely that MEK caused the bilirubin to elevate.

Medical Evidence

Respondent's exhibit 7 is the record from Norman Regional Hospital. Claimant was transferred to Norman Regional from Pauls Valley Hospital after the March 14, 1998 episode. The record states that an Emergency Room doctor reported Claimant's blood count, chemistry, x-ray and EKG were normal, as was his neurological exam. The report includes admission information, medication Claimant is currently taking, initial pairs assessment, functional/fall risk assessment, medical history past and current and family medical history. It also states previous hospitalizations, admission assessment, age specific needs and discharge planning information. After the detailed questionnaire, the report contained a written report by Dr. Robert Dow.

Dr. Dow's report was based on the March 14, 1998 episode. His report states that Claimant's chief complaint was a black out. His report details the history of Claimant's present illness and past medical history, review of systems and physical examination of Claimant. The complete examination revealed Claimant's vital sings to be normal. Head, eyes, ears, nose, throat, chest, heart, and abdomen were normal. As regards neurological, the report stated Claimant was awake, alert, oriented and exhibited no inattention. Dr. Dow's assessment was that Claimant's episode represented a partial seizure.

Respondent's exhibit 7 also contains the documentation regarding several tests Claimant underwent. Claimant's CT scan and EEG were normal.

Claimant's exhibit 1, pages 1-3 and Respondent's exhibit 6 are Dr. Swygert's report of July 22, 1999. The report was based on a June 30, 1999 physical examination⁸. Her assessment of Claimant's symptoms that he was experiencing as a result of the March 14, 1998 incident, was an "acute confusion episode of undetermined etiology and intermittent tremor of the hands." (CX 1, pg. 2; RX 6, pg. 2) Dr. Swygert was unfamiliar with the various types of possible chemicals Claimant could have been exposed to at TAFB. She referred him to OMS for a more extensive evaluation.

⁸Neither Claimant nor Employer offered into evidence Dr. Swygert's report immediately following the March 14th episode.

Respondent's exhibit 8 is the report from Dr. Tribbey dated April 28, 1998. Dr. Tribbey is the neurologist Dr. Swygert referred Claimant to see after the March 14, 1998 episode.⁹ Dr. Tribbey is board certified in psychiatry and neurology. (RX 24) Dr. Tribbey took Claimant's medical family and social history. He performed a physical examination. His impression was that Claimant may have suffered a partial complex seizure and that his complaints may be more "psychosomatic or psychological in nature." (pg. 3-4) He suggested that Claimant may benefit from a behavioral medicine consult via the OKC Clinic personnel.

Respondent's exhibit 9 is the report of Dr. Parks concerning their examination of Claimant on May 20, 1998. A history of Claimant was taken as well as the performance of a physical examination. Dr. Parks' assessment of Claimant from the examination was a finding of "no neurological deficits and no deficits on physical examination." (pg. 3) He referred Claimant to Dr. Adams for neuropsychiatric testing to judge whether or not Claimant has received toxic insult to the brain.

Respondent's exhibit 10 is the report from Dr. Angles, at OMS, concerning Claimant's August 7, 1998 injury. In his report, dated August 13, 1998, Dr. Angles placed no restrictions upon Claimant, so that Claimant was able to return to work without restrictions. Dr. Angles' instructions for the supervisor and Claimant was to return to the clinic as needed. The "Assessment and Disposition" portion of the report stated that "There is no detected medical condition which would place the individual at increased risk of material health impairment from exposure." (pg. 5)

Respondent's exhibit 11 and Claimant's exhibit 17 is the report from Dr. Stephen Carella. Dr. Carella is a licensed psychologist. (RX 23) He examined Claimant in June and July of 1998. It was a self referral for a neuropsychological evaluation regarding reported seizure activity. Dr. Carella took a history of Claimant and then performed various tests. His diagnostic impression was "Axis III, possible occupational toxic exposure." (pg. 8) "Axis IV, Psychosocial problems: mild cognitive impairment; Possible occupational toxic condition, Rule out toxicity." (pg. 8-9) He recommended that Claimant "participate in individual psychological therapy to focus on concerns regarding somatic complaints and possible work place toxic exposure; Rule out toxic exposure at this individual's

⁹This is evident from Dr. Tribbey's report as he thanks Dr. Swygert for the referral.

work site.” (pg. 9)

Claimant’s exhibit 1, pg. 8 and Respondent’s exhibit 12 is the report of Dr. Moser when he examined Claimant in February 2000. Dr. Moser took a history and Claimant explained that he had chest pain and shoulder pain. According to Dr. Moser’s report, Claimant told him that he had symptoms after inhaling gear oil fumes and he thinks he possibly was exposed to Desert Storm Syndrome after working on mechanical air parts at TAFB. Dr. Moser then performed a physical examination of Claimant. Dr. Moser recommended treating his symptoms. His diagnosis was that Claimant’s symptoms seemed like anxiety and benign essential tremor.

Claimant’s exhibit 1, pg. 7 is Dr. Moser’s report of March 2000. According to Dr. Moser’s report Claimant complained of ear pain and chills, and decreased hearing in right ear. He denied recent trauma or infection. He reported having a history of seasonal allergies and hay fever. The doctor performed a physical exam. Dr. Moser’s assessment was Hyperlipidemia, seasonal allergies and hay fever.

Claimant’s exhibit 1, pg. 6 is Dr. Moser’s report of April 2000. The report states that Claimant said that another doctor, Dr. Gross, did a Mycoplasma panel and it was positive for Mycoplasma pneumonia. Claimant was not having symptoms. Dr. Moser’s report states that he will ask his partners if a certain medication would be of any benefit to Claimant.

Respondent’s exhibit 13 and Claimant’s exhibit 16 is the report from Dr. Adams. Dr. Moser referred Claimant to Dr. Adams for an evaluation of Claimant’s intellectual and cognitive functioning. Dr. Adams is a licensed clinical psychologist. (RX 22) Dr. Adams found that Claimant “did not experience any neuropsychological dysfunction related to toxic exposure.” (pg. 1) He also found through psychological testing and clinical interview that Claimant has “long term emotional symptoms” (pg. 1) “These findings suggest that his reported memory and attention problems are likely functional rather than brain related. Overall, the pattern of results is not consistent with a diagnosis of identifiable organic memory impairment.” (pg. 1) Dr. Adams recommended a course of antidepressant medication. The doctor’s extended report covered Claimant’s current complaint; medical, family, psychiatric, psychosocial, legal histories; behavioral observations and mental status exam and assessment procedures used on Claimant.

Respondent's exhibit 30 is a medical report from Dr. Paul. Claimant was referred to Dr. Paul by Dr. Moser. Dr. Paul is a board certified medical toxicologist. (RX 21) The exam was performed at the Oklahoma Poison Treatment Clinic. Claimant completed a questionnaire, which included detailed questions concerning his past medical history, current health status, functional reports, personal environment, job description. Claimant was seeking treatment for chemical sensitivity. Dr. Paul's physician chart notes state "As far as an eval, this report of Dr. Adams does not suggest toxic causation."

Respondent's exhibit 14 is an excerpt from a lecture given by Dr. Herman Staudenmayer, about Environmental Illness. This lecture discusses multiple chemical sensitivity (MCS). "MCS casts a broad net which fails to exclude individuals whose symptoms are explained by alternative well-established medical or psychiatric diagnoses." (pg. 5) The term MCS seems to be too broad and is over-inclusive, according to Dr. Staudenmayer.

Findings of Fact and Law

Section 12 Notice

Section 12 states that "Notice of injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of a relationship between the injury or death and the employment, except that in the case of occupational disease . . . notice shall be given within one year"

The trier of fact must determine the date on which the claimant became aware of, or should have become aware of, the relationship between the disease, the employment, and death or disability. *Martin v. Kaiser Co.*, 24 BRBS 112 (1990); *Horton v. General Dynamics Corp.*, 20 BRBS 99 (1987).

Claimant began to suspect that he had possibly been exposed to toxic chemicals following his car accident on March 14, 1998. A few days after his

accident, Claimant testified that he went to see Dr. Swygert who told him that his injury could possibly have something to do with the chemicals found at TAFB. Therefore, I find that Claimant was aware of his suspected relationship between the disease and his employment in March of 1998.

Claimant filed his first formal written notice of injury on November 14, 1998¹⁰. Claimant filed within 12 months as provided for by the Act. Therefore, I find that Claimant gave timely notice to Employer and is not time barred by Section 12, because his claim is based on the theory of occupational disease which calls for notice within 12 months..

Regardless of the occupational disease exception, however, neither is Claimant barred by the traditional 30 day timely notice. Claimant timely notified his employer after each episode. When Claimant was released from Norman Regional Hospital after the March 14th injury, Claimant called his supervisor. Employer had notice of the injury. Claimant and Employer might not have yet realized that the injury could be work related, but based on Ms. Mital's testimony, samples were taken in the workplace so Employer obviously considered the possibility. Claimant's subsequent complaints and OSHA's investigation likewise served as notice to Employer. As for the August 7th episode, immediately upon inhaling fumes Claimant told his supervisor and went directly to OMS at TAFB.

Causation

Claimant has the burden of establishing a *prima facie* case of compensability. Section 20(a) of the Act, 33 U.S.C. § 920(a), creates a presumption that a claimant's disabling condition is causally related to his employment. In order to invoke the Section 20(a) presumption, a claimant must prove that he suffered a harm and that conditions existed at work that could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16

¹⁰Claimant's counsel in her brief stated that Claimant filed a request for compensation on November 24, 1998. Regardless of the exact date, Claimant filed for compensation in November 1998, which was within the 12 months allowed.

BRBS 98 (1984). It must be further recognized that all factual doubts must be resolved in favor of Claimant. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Strachan Shipping Co. v. Shea*, 406 F.2d 521 (5th Cir. 1969). Furthermore, it has been consistently held that the Act must be construed liberally in favor of Claimant. *Voirs v. Eikel*, 346 US 328, 333 (1953); *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397, 399 (5th Cir. 1987);

Claimant had an episode on March 14, 1998. While driving with his family in their van, he became unresponsive and drove off of the side of the road. His symptomatology was that of severe chest pains, full body tremors, bouts of confusion, memory problems, severe bleeding in his stool, stomach problems, and skin problems which included sores and rashes. The medical records support the finding that Claimant suffered some kind of harm. However, there is no evidence to support whether or not conditions existed at work that could have caused, aggravated or accelerated Claimant's condition.

Claimant testified that prior to March 14, 1998 he was exposed to Triorthocresyl- phosphate (TOCP) during his employment at TAFB. Claimant testified that a month prior to his March 14th episode, Claimant opened boxes that stored aircraft parts. Strong odors emanated from the boxes and the boxes were saturated with oil. Except for his testimony, however, Claimant did not produce any evidence to show that he was exposed to TOCP. Claimant testified that he came into contact with grease and oils and offered into evidence the MSDS for greases, oils and lubricants. (CX 7) Claimant testified that TOCP is a component of such elements, but the MSDS Claimant offered into evidence does not list TOCP as a compound found in oils, greases and lubricants. In fact, no exhibit offered lists TOCP as an element to be found in oils, greases, and lubricants.

Obviously, Claimant believed the harmful chemical to be TOCP because of research he had performed on the internet, literature he had received from the Center for Disease Control (CDC) and primarily because doctors had otherwise come up with no affirmative diagnosis for his behavior on March 14, 1998. According to Claimant, he was sent a toxicological profile manual from the CDC. Claimant testified that the manual explained the different materials to be found in the oils and greases, of which TOCP was one. However, neither this manual nor other evidence that TOCP is found in certain compounds was offered into the record.

Granted, Ms. Mital testified as to the effects of TOCP exposure. She based her knowledge on the American Industrial Hygiene Association guide.¹¹ The symptoms of TOCP exposure, according to Ms. Mital, include nausea, vomiting, diarrhea and paralysis, the effects of which can be delayed for about 3 weeks after exposure. (Tr. 342, lines 13-19) The paralysis is found in the upper and lower extremities, though mainly lower extremities. (lines 20-23) In the lower extremities, the paralysis manifests itself as foot and calf pain. (Tr. 343, lines 1-2) Claimant did not produce evidence, medical or otherwise, to show that his particular symptoms were related to TOCP exposure.

Immediately after the March 14th incident, Claimant went to Pauls Valley Hospital. He was then transferred to Norman Regional Hospital. The report from Norman Regional stated that Claimant's blood count, chemistry, x-ray, EKG, neurological exam, CT scan and EEG were normal. Dr. Dow evaluated Claimant. His assessment was that Claimant's episode represented a partial seizure.

Dr. Swygert was the next doctor who evaluated Claimant following his episode. However, neither Claimant nor Respondent offered a copy of this report into the record. Dr. Swygert referred Claimant to Dr. Tribbey, a neurologist. Dr. Tribbey's impression of Claimant was that Claimant may have suffered a partial complex seizure and that his complaints may be more psychosomatic or psychological in nature.

Dr. Parks next examined Claimant on May 20, 1998. His assessment was a finding of "no neurological deficits and no deficits on physical examination."

Claimant last medical provider prior to the August 7th episode was Dr. Carella, a psychologist. Dr. Carella performed a neuropsychological evaluation of Claimant in June and July of 1998. Dr. Carella's diagnostic impression was possible occupational toxic exposure on Axis III and Axis IV. He recommended ruling out toxic exposure.

Dr. Swygert examined Claimant on June 30, 1999, 15 months after the 1998

¹¹This guide was not offered into the record.

incident¹². Her assessment of Claimant's symptoms that he was experiencing as a result of the March 14, 1998 incident, was an "acute confusion episode of undetermined etiology and intermittent tremor of the hands." (CX 1, pg. 2; RX 6, pg. 2) Dr. Swygert was unfamiliar with the various types of possible chemicals Claimant could have been exposed to at TAFB. She referred him to OMS for a more extensive evaluation.

In sum, Claimant has demonstrated neither exposure to TOCP nor psychological or physical symptoms or effects related to TOCP exposure. While I find Claimant's report of his symptoms to perhaps be credible, I do not, in the absence of expert testimony, find his lone theory of toxic exposure and/or a correlation between TOCP and his condition to be sufficient to establish a prima facie case. Because Claimant has not shown conditions existed at work that could have caused his symptoms on March 14, 1998, I find that with regards to the March 14, 1998 episode, Claimant has not met his burden of establishing a prima facie case sufficient to invoke the Section 20(a) presumption.

On August 7, 1998, Claimant contends that he was exposed to Methylethylketone (MEK) while cutting the bottom of a barrel. Upon opening the barrel, Claimant testified that he had a headache, chest pains, tremors, confusion and memory problems.

Ms. Mital testified that if a smell emanates from a barrel, then residue of something was still inside of the barrel. She also testified that it is possible for the barrels to contain any substance found on the base. Her prior report of July 16, 1998 states that "parts come into the facility already been decontaminated and triple rinsed, but sometimes oils are still inside the various parts." (CX 2, pg. 3) Ms. Mital testified that her two technicians, upon being called to the scene, found no detectable amount of MEK or any other chemical present inside of the barrel.

Claimant and Mr. Snow both testified that they removed the MSDS from the barrel. The MSDS of MEK was offered and accepted into evidence. The MSDS for MEK stated that MEK was a hazardous material. The effects of acute overexposure included: "Eyes- causes irritation, redness, tearing. Skin-

¹²Neither Claimant nor Employer offered into evidence Dr. Swygert's report immediately following the March 14th episode.

prolonged/repeated contact can cause moderate irritation, dermatitis. Breathing excessive inhalations of vapors can cause nasal and respiratory irritation. Central nervous system effects including dizziness, weakness, fatigue, nausea, headache, and possible unconsciousness, and even death.” (RX 10)

Immediately upon exposure, Claimant went to OMS and was examined by Dr. Angles. Dr. Angles performed a complete physical examination and ran various tests. Claimant had taken the MSDS for the MEK to Dr. Angles, so Dr. Angles could compare Claimant’s symptoms with those listed on the MSDS.

Dr. Angles’ professional opinion was that Claimant did not suffer from harmful exposure to MEK on August 7, 1998. He released Claimant to return to work without restrictions. Dr. Angles’ instructions for the supervisor and Claimant was to return to the clinic as needed. The “Assessment and Disposition” portion of the report stated that “There is no detected medical condition which would place the individual at increased risk of material health impairment from exposure.” (pg. 5)

Dr. Swygert examined Claimant in June of 1999. However, her evaluation was based on the March 14, 1998 injury relating to TOCP exposure, not the August 7, 1998 injury relating to MEK exposure.

Dr. Moser was the next doctor to examine Claimant, with regards to the MEK exposure. He saw Claimant on February 21, 2000. Dr. Moser took a history and Claimant explained that he had chest pain and shoulder pain. According to Dr. Moser’s report, Claimant told him that he had symptoms after inhaling gear oil fumes and he thought he possibly was exposed to Desert Storm Syndrome after working on mechanical air part at TAFB. Dr. Moser then performed a physical examination of Claimant. Dr. Moser recommended treating Claimant’s symptoms. His diagnosis was that Claimant’s symptoms seem like anxiety and benign essential tremor.

Claimant, in discussing his symptoms, did not complain of Multiple Chemical Sensitivity syndrome. Instead, he expressed to Dr. Moser his belief that he had contracted Desert Storm Syndrome. Claimant did not allege he suffered from exposure to MEK, and, in fact, Claimant did not complain of physical symptoms associated with MEK, as found on the MSDS offered into evidence.

Claimant was next examined by Dr. Adams in April 2000. Dr. Adams evaluated Claimant's intellectual and cognitive functioning. Dr. Adams found that Claimant "did not experience any neuropsychological dysfunction related to toxic exposure." (pg. 1) He also found through psychological testing and clinical interview that Claimant has "long term emotional symptoms" (pg. 1) "These findings suggest that his reported memory and attention problems are likely functional rather than brain related. Overall, the pattern of results is not consistent with a diagnosis of identifiable organic memory impairment." (pg. 1)

Dr. Adams recommended a course of antidepressant medication. The doctor's extended report covered Claimant's current complaint; medical, family, psychiatric, psychosocial, legal histories; behavioral observations and mental status exam and assessment procedures used on Claimant. Dr. Adams, a licensed clinical psychologist, diagnosed that Claimant did not suffer from a psychological dysfunction related to toxic exposure.

Lastly, Dr. Paul, a board certified medical toxicologist, examined Claimant. The exam was performed at the Oklahoma Poison Treatment Clinic. Claimant completed a questionnaire, which included detailed questions concerning his past medical history, current health status, functional reports, personal environment, and job description. Claimant was seeking treatment for chemical sensitivity. Dr. Paul's physician chart notes state "As far as an eval, this report of Dr. Adams does not suggest toxic causation." In other words, Dr. Paul appeared to concur with Dr. Adams.

The fact that Mr. Snow suffered no symptoms when the barrel was opened and the fact that Ms. Mital's immediate investigation discovered no detectable amount of MEK or any other chemical in the barrel, coupled with the immediate finding of Dr. Angles that Claimant suffered from no harmful exposure, causes me to conclude that Claimant, just as with TOCP, has failed to show conditions existed at work which could have caused him symptoms on August 7, 1998. As previously noted, while I find Claimant's report of his symptoms to perhaps be credible, I do not, in the absence of expert testimony, find his lone theory of toxic exposure and/or a correlation between MEK and his symptoms to be sufficient to establish a prima facie case. For these reasons, I find that Claimant has not met his burden of establishing a prima facie case sufficient to invoke the Section 20(a) presumption.

Conclusion

In his post- trial brief, Claimant, through counsel, correctly observes that what this record establishes “is objective and subjective documentation of physical symptoms of unknown etiology” with some experts referencing the need to rule out toxic exposure. (pg. 3). I agree. Not a single medical expert of record has come forward in this case to support Claimant’s theory that he suffers any symptoms or disability as a result of his exposure to either TOCP or MEK in the work place. In fact, most experts who spoke on the subject concluded that Claimant does not suffer any injury or disease as a result of such exposure, and those that made no specific finding noted only that toxic exposure need be ruled out. This coupled with the fact that Claimant has failed to establish work conditions that could have caused symptoms requires a finding that Claimant has failed to invoke the Section 20 (a) presumption. However, even assuming that Claimant invoked the Section 20 (a) presumption, the same was rebutted by those experts who have stated that Claimant does not suffer from toxic exposure. An Employer, in order to rebut the presumption, is not required to establish another agency of causation, rather “ . . . the testimony that no relationship existed between an injury and a Claimant’s employment is sufficient to rebut the presumption.” *O’Kelly v. Department of the Army/Naf.*, 34 BRBS 39, 41 (May 2, 2000) Employer has met its burden in this instance.

In 1994, the Supreme Court in *Greenwich Collieries* held that the “true doubt” rule violated the Administrative Procedure Act, thereby placing the burden on the employee to prove causation by preponderance of the evidence after the Section 20 (a) presumption has been rebutted. 114 S.Ct. 2251, 28 BRBS 43. When the presumption is removed in this instance it most certainly leaves the Claimant with a burden this record cannot carry. In sum, when the evidence is weighed as a whole, Claimant failed to establish causation by a preponderance of the evidence, for there is no reliable evidence to conclude that work conditions existed or a work accident occurred which could have caused, aggravated, or accelerated Claimant’s condition. Thus, Claimant’s claim for benefits must be denied.

ORDER

It is hereby **ORDERED** that Claimant’s claim for benefits under the Act is

DENIED.

So **ORDERED** this 29th day of September, 2000, at Metairie, Louisiana.

C. RICHARD AVERY
Administrative Law Judge

CRA:haw